

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN KARR,

Plaintiff-Appellant,

v

STEPHEN E. BOODIN, M.D.,

Defendant-Appellee.

UNPUBLISHED

February 9, 2006

No. 256657

Oakland Circuit Court

LC No. 04-056315-NH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and dismissing this medical malpractice case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On February 22, 2002, defendant, Doctor Boodin, performed surgery on plaintiff's spinal cord. Subsequently, plaintiff suffered renewed symptoms and underwent further surgery performed by another physician. By letter dated December 14, 2002, plaintiff requested a complete copy of his medical records from defendant. On December 17, 2002, in response to plaintiff's request, defendant forwarded a copy of plaintiff's medical records to plaintiff.

A review of the record reveals that on January 3, 2003, plaintiff mailed a notice of intent (NOI) to file a medical malpractice action against Beaumont Hospital and defendant. The NOI contained a demand for a copy of defendant's records pertaining to his treatment of plaintiff. By letter dated August 18, 2003, plaintiff's counsel informed defendant's counsel that his medical records had not been received. On August 21, 2003, defendant's counsel forwarded a copy of plaintiff's chart to plaintiff's counsel.

On February 20, 2004, plaintiff filed suit against defendant alleging medical malpractice. The complaint was not accompanied by an affidavit of merit as required by MCL 600.2912d(1). The complaint stated that because defendant did not produce his medical records within fifty-six days after being served with the NOI, as required by MCL 600.2912b(5), the affidavit could be filed within ninety-one days after filing the complaint. MCL 600.2912d(3). Plaintiff filed an affidavit of merit on May 19, 2004.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that because plaintiff's complaint was not accompanied by an affidavit of merit as required by statute, the filing of the complaint did not toll the statute of limitations. In response to plaintiff's assertions that medical records had not been provided as required, defendant noted that plaintiff had received a copy of his medical records by letter dated December 17, 2002, before defendant received the NOI. Further, defendant stated that plaintiff's counsel had received a copy of plaintiff's chart in August 2003. Defendant's office manager furnished an affidavit in which she stated that on December 17, 2002, three days after receiving plaintiff's request for defendant's records, she sent to plaintiff a copy of defendant's entire chart, the only records under defendant's control. Defendant's office manager further indicated that she received no further correspondence from plaintiff indicating that he or plaintiff's counsel had not received the records. Defendant also argued that plaintiff's complaint was insufficient because it raised issues not stated in the NOI.

The trial court granted defendant's motion. The trial court noted that defendant had furnished the relevant records to plaintiff on December 17, 2002 and that plaintiff had access to the requested records within fifty-six days after the defendant received the NOI. Therefore, plaintiff was not entitled to an additional ninety-one days in which to file an affidavit of merit. The trial court concluded that plaintiff's complaint was time-barred and did not address defendant's remaining arguments.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). We also review issues of statutory interpretation de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mu Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000).

III. ANALYSIS

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). MCL 600.2912d(1) requires a medical malpractice plaintiff to file with the complaint an affidavit of merit signed by a health professional who meets or whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness. The affidavit must contain a statement of the applicable standard of practice, the health professional's opinion that the defendant breached the applicable standard of practice, the actions the defendant should have taken in order to have complied with the applicable standard of practice, and the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury. If a medical malpractice plaintiff wholly fails to file an affidavit of merit, the statute of limitations is not tolled, and if the limitations period has expired, dismissal of the suit with prejudice is appropriate. *Scarsella v Pollack*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

A health professional must, within fifty-six days after receiving a NOI, allow the claimant access to all relevant medical records under his or her control. MCL 600.2912b(5). If a

defendant in a medical malpractice action fails to allow access to relevant medical records, the affidavit of merit required by MCL 600.2912d(1) may be filed within ninety-one days after the filing of the complaint. MCL 600.2912d(3).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. He asserts that because defendant did not allow access to relevant records within fifty-six days after receiving the NOI, as required by MCL 600.2912b(5),¹ the clear and unambiguous language of MCL 600.2912d(3) allowed him ninety-one days after filing the complaint in which to file an affidavit of merit.

The purpose of requiring a medical malpractice plaintiff to file an affidavit of merit is to deter frivolous claims. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). In order to secure an expert witness to file an affidavit of merit, a plaintiff must have access to relevant medical records. By enacting MCL 600.2912d(3), the Legislature afforded a plaintiff who does not receive access to relevant records within the time required by MCL 600.2912b(5) extra time in which to file an affidavit of merit. The purpose of providing an additional ninety-one days to file the affidavit of merit is to deter the medical malpractice defendant from failing to provide a plaintiff's medical records in a prompt and fair manner.

Plaintiff received a copy of defendant's records in December 2002, before he mailed the NOI to Beaumont and defendant. Thus, after that date, he had access to the information that would be needed by an expert witness in order to evaluate the merits of plaintiff's claim. The trial court's application of MCL 600.2912b(5) and MCL 600.2912d(3) was correct. Plaintiff failed to file an affidavit of merit with the complaint as required; therefore, the filing of the complaint did not toll the statute of limitations. *Scarsella, supra*. Summary disposition was correctly granted.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

¹ Plaintiff's argument that defendant produced only partial records was not raised in the trial court, and thus is not properly preserved for appeal. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).